

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HENRY C. ALDERS	:	DETERMINATION
WHOLESALE FLORIST, INC.	:	DTA NO. 819221
	:	
for Revision of a Determination or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1997 through May 31, 2000.	:	

Petitioner, Henry C. Alders Wholesale Florist, Inc., 110 Egbertson Road, Campbell Hall, New York 10916, filed a petition for revision of a determination or for refund of sales and use taxes under Article 28 and 29 of the Tax Law for the period September 1, 1997 through May 31, 2000.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed February 26, 2003, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5; 3000.9(a)(i) and (b). Petitioner, which appeared by its representative, Thomas R. DiGovanni, CPA, had 30 days, or until March 28, 2003, to respond to the motion but did not do so, and the 90-day period for issuance of this determination commenced on March 28, 2003. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Henry C. Alders Wholesale Florist, Inc., a Notice of Determination, dated July 16, 2001 and addressed to petitioner at “P.O. Box 276, 110 Egberton Road, Campbell Hall, NY 10916-0276.” The notice bore assessment identification number L-019821840-6 and asserted a total amount due of \$8,764.35. As indicated by the computation summary section of the notice, this amount consisted of sales and use tax assessed of \$15,434.48, plus interest of \$3,329.87 and a credit of \$10,000.00, for the period September 1, 1997 through May 31, 2000.

2. On September 18, 2002, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Determination dated July 16, 2001.

3. On October 11, 2002, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on July 16, 2001, but the request was not received until September 20, 2002, or in excess of 90 days, the request is late filed.

4. Notices of determination, such as the one at issue herein, were computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of determination were being mailed

and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

5. Each computer-generated notice of determination was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of July 4, 2001 which was manually changed to July 16, 2001.

6. After a notice of determination was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

7. In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control unit.

8. In the instant case, the CMR was a 24-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR lists 256 control numbers. Each such certified control number was assigned to an item of mail listed on the 24 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

9. Information regarding the Notice of Determination issued to petitioner was contained on page 12 of the CMR. Corresponding to certified control number 7104 1002 9739 0031 6184 was notice number L 019821840, along with petitioner’s name and an address, which was identical to that listed on the subject Notice of Determination.

10. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated July 16, 2001, and the initials of the postal employee, verifying receipt of the items.

11. The last page of the CMR, page 24, contained a pre-printed entry of “256” corresponding to the heading “Total Pieces and Amounts Listed.” This pre-printed entry was manually circled and beneath it was the aforementioned postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee. These same initials appeared on page 1 of the CMR.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “256” indicated that all 256 pieces listed on the CMR were received at the post office.

13. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

14. The facts set forth above in Findings of Fact “4” through “13” were established through the affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of determination. Mr. LaFar was employed as a Principal Mail and Supply Clerk in the Division’s Mail Processing Center. Mr. LaFar’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The address on the subject Notice of Determination was the same as the address given on petitioner’s New York State and Local Quarterly Sales and Use Tax Return (form ST-100) for the period March 1, 2001 through May 31, 2001, dated June 7, 2001. In addition, the same address was used by petitioner on its power of attorney form, dated August 16, 2000.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division’s motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits; consequently, those facts may be deemed admitted (*see, Kuehne &*

Nagel v. Baiden, *supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.” In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner’s last known address.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. (*See, Matter of Novar TV & Air Conditioner Sales and Service, Inc.*, Tax Appeals Tribunal, May 23, 1991 [where the Tax Appeals Tribunal stated that “where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination”].) Where a notice is found to have been properly mailed, “a

presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination in issue was mailed to petitioner on July 16, 2001. Specifically, this 26-page document listed certified control numbers with corresponding names and addresses, including petitioner’s control number, notice of determination number, name and address. All 24 pages of the CMR bore a U.S. Postal Service postmark dated July 16, 2001. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 24 of the CMR and circled “256” on that page to indicate receipt by the post office of all 256 pieces of mail listed thereon (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed])). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on July 16, 2001.

H. Petitioner's request for conciliation conference was filed on September 18, 2002, over a year after the date of mailing of the instant Notice of Determination. The request was therefore untimely filed (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The petition of Henry C. Alders Wholesale Florist, Inc. is dismissed.

DATED: Troy, New York
May 29, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE